QUESTION PRESENTED

Whether the inherent power of a court to punish a witness for contempt, committed in the presence of the Court in the courtroom, for refusing to testify in open court at a Court of Inquiry, after conferring with his attorney in the courtroom, on the sole ground that Article 9.02 of the Texas Election Code is invalid, makes said Article 9.02 of the Texas Election Code contravene the due process clause of the 14th Amendment to the United States Constitution.

STATUTE INVOLVED

Section 130 of the Texas Election Code (Article 9.02, Election Code, Vernon's Texas Annotated Civil Statutes) is set forth in full in the Petition at pages 23-24.

STATEMENT

Respondent denies each and every allegation of fact stated by Petitioners in their Petition, except those facts supported by the record, and those facts specially admitted by the Respondent. Reference to page numbers in the record throughout this Brief will be to the original pages numbers in the original Statement of Facts and in the Transcript, since the record before this Court embodies both of these instruments; and the record as compiled by the Clerk of the Supreme Court of Texas, and filed in this Court, was not submitted to the Attorney General

of Texas before it was filed, and references to page numbers in the record as shown by Petitioners in their Petition do not correspond with the original page numbers in the original Statement of Facts and Transcript.

This case is an original application for relief by writ of *habeas corpus* filed in the Supreme Court of Texas to secure the release of the Petitioners from the custody of the Respondent, Sheriff of Webb County, Texas, who was holding Petitioners in his custody by virtue of an order of the Judge of the 49th District Court of Webb County, Texas, for contempt of court committed in the presence of the Court by Petitioners for refusing to answer questions propounded to them by the District Attorney in a Special Court of Inquiry, convened in the 49th District Court, by authority of Article 9.02 of the Texas Election Code for the purpose of investigating alleged election frauds. The Judge presiding in the 49th District Court entered an order on June 11, 1958, holding Petitioners in contempt of court, and assessed their punishment at confinement in the Webb County Jail for a period of three days. (Transcript, page 2)

The Petition attempts to lead this Court to believe that Petitioners were held in contempt for claiming their privilege against self incrimination, by quoting a brief portion of what transpired while the Petitioners were before the Court of Inquiry. In truth and in fact, the Petitioners, and each of

them, when summoned to the witness chair to testify, acting on the advice of their counsel, refused to testify on the ground that Article 9.02 of the Texas Election Code was unconstitutional, For a full statement of what transpired while Petitioners were before the Court, see the Appendix to this Brief. (Brief, page 9). For purpose of identification of the parties when reading the Appendix, it is here stated that Mr. Kazen was the District Attorney, and Mr. Hornberger was the attorney for the Petitioners.

An examination of all that transpired while Petitioners were before the Court (Statement of Facts, pages 76-81) shows that Petitioners had their attorney present in the courtroom with them, and that when each of the Petitioners refused to testify, each Petitioner was allowed to consult with his attorney, and that thereafter each Petitioner refused to testify on the sole ground that the Court of Inquiry was a void proceeding because the statute under which it was convened was unconstitutional.

At the conclusion of the hearing, the Court entered its order holding Petitioners in contempt, reciting in part as follows:

> "... ; and it appearing to the court that said questions were proper and pertaining to violations of election laws of the State of Texas, and these matters being under investigation by this Court of Special Inquiry, and said questions having been asked by the District Attorney of

each of said witnesses, and each of said witnesses having refused to answer, stating their refusal to answer was because Article 9.02 is unconstitional, . . ." (Transcript, page 2)

The Petitioners did not claim their privilege against self incrimination, but refused to answer solely on the lack of jurisdiction of the Court to conduct the hearing on the ground that Article 9.02, of the Texas Election Code, authorizing this type of proceeding, was unconstitutional. Other witnesses who appeared before this same Court of Inquiry, who claimed their privilege against self incrimination, were promptly excused, and were not held in contempt. See the testimony of the witness, Felix Martin (Statement of Facts, pages 81-85; the witness, Jose Pepe Rodriguez (Statement of Facts, pages 105-106; the witness, Jesus M. Garza (Statement of Facts, pages 137-138); the witness, Hugh S. Cluck (Statement of Facts, pages 168-171); the witness, Manuel Gutierrez (Statement of Facts, pages 184-185); and the witness, Joe C. Martin, Jr. (Statement of Facts, pages 188-189).

ARGUMENT

In *Ex parte Hudgings* (1919), 249 U. S. 378, it was stated on page 382:

> "That the contumacious refusal of a witness to testify may so directly obstruct a court in the performance of its duty as to justify punishment for contempt is so well settled as to need only statement."

If the type of investigatory proceeding for the purpose of investigating election frauds, authorized under Article 9.02 of the Texas Election Code, is unconstitutional, it casts a cloud on many other types of investigations of ancient usage, such as examining trials and inquests. The hearing before the District Court was conducted in open court, and each Petitioner had his attorney present in the courtroom. Each Petitioner was allowed to consult with his attorney, and the attorney was permitted to address the court in behalf of each petitioner.

In *Cooke v. United States* (1925), 267 U. S. 517, the Court said at page 535:

> "Where the contempt is committed directly under the eye or within view of the court, it may proceed 'upon its own knowledge of the facts and punish the offender without further proof, and without issue or trial in any form' . . ."

In *Fisher v. Pace* (1949), 336 U. S. 155, the Court said at page 159:

> "Historically and rationally the inherent powers of the court to punish contempts in the face of the court without further proof of facts and without aid of jury is not open to question."

There is no conflict of decision upon the principle of the right of a court to punish for contempt committed in open court in the presence of the court. There is no important question of federal law to

be decided here. A state statute enacted for the purpose of aiding in preserving the purity of the ballot box, and providing for a court of inquiry to be conducted before a district judge in open court, in order to ascertain the facts with reference to allegations of voting irregularities, such as Article 9.02 of the Texas Election Code, does not violate the United States Constitution and the amendments thereto, and no substantial federal question is presented in this case.

CONCLUSION

We respectfully submit, therefore, that the Petitioners do not submit a substantial federal question, and for the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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SERVICE

I, W. V. Geppert, Assistant Attorney General of Texas, am a member of the Bar of the Supreme Court of the United States, and I do now enter my appearance in the Supreme Court of the United States in the above captioned cause, in behalf of the Respondent, and I do further certify that a copy of the foregoing Brief has been forwarded by United States Mail, First Class, Postage Prepaid, to Petitioners' Attorney, Mr. Gerald Weatherly, P. O. Box 1386, Laredo, Texas.

W. V. GEPPERT
Assistant Attorney General of Texas

APPENDIX

Testimony of A. H. Jimenez and Juan M. Puente, Petitioners before the Court of Inquiry, as found on pages 76-81 of the Statement of Facts.

MR. KAZEN: A. H. Jimenez.

A. H. JIMENEZ was called as the next witness, first being duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows, to-wit:

DIRECT EXAMINATION

BY MR. KAZEN:

Q. Your name is A. H. Jimenez.

A. That's right.

Q. And you are Chief of the City Detectives?

A. Yes, Sir.

Q. It is my duty to warn you that certain charges have been made here before the Court of Inquiry that may incriminate you, and that if charges are preferred against you, that you will be prosecuted. The law does not compel you to make any statement whatsoever, but if you would like to you may make any voluntary statement you desire, but any statement that you may make can be used in evidence when you are tried on these charges. Do you want to make a statement?

A. I refuse to testify; I have to consult to my attorney.

Q. Just a second —

A. Your Honor, I refuse to testify, but I want to talk to my attorney.

THE COURT: You may consult with your attorney.

(Witness confers with attorney.)

THE WITNESS: Your Honor, I talk to my attorney; is against the Constitution to testify here, that's what I refuse to testify.

MR. KAZEN: I didn't understand. You are refusing to testify because of what?

THE WITNESS: My attorneys told me not to do it.

MR. KAZEN: Your attorney told you not to do it?

THE WITNESS: Not to do it, my Civil Rights, not to do it, my Civil Rights.

MR. KAZEN: Civil Rights?

THE COURT: Yes, that is not sufficient grounds, Mr. Jimenez. Let's have order please. That is not a sufficient ground, the Court can't honor that statement with regard to your refusal to testify.

THE WITNESS: Well, if you want me to make a statement, I think my attorney can make the statement.

MR. HORNBERGER: If the Court will permit me to make a statement —

THE COURT: Yes, Sir.

MR. HORNBERGER: I advised him, advised him that this whole hearing was without legal basis in my opinion; the Statute under which it was brought is unconstitutional, and that he should refuse to testify.

THE COURT: Is that the only ground?

MR. HORNBERGER: Yes, Sir.

THE COURT: All right.

MR. KAZEN I move that we hold this man—you mean that you know violations of the election laws and you are refusing to testify on the ground that you don't think this is a legally constituted Hearing, is that correct?

MR. HORNBERGER: Just say, "I refuse to testify on the basis which my attorney stated."

THE WITNESS: I refuse to testify; this is my answer the third time, I refuse to testify.

MR. KAZEN: You are refusing to testify?

THE WITNESS: That's right.

MR. KAZEN I move that this wtiness be held in Contempt of Court, Your Honor.

THE COURT: All right, I will rule on that shortly, Counsel. Call your next witness.

MR. KAZEN: All right.

WITNESS EXCUSED.

MR. KAZEN: Juan M. Puente.

JUAN M. PUENTE was called as the next witness, first being duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. KAZEN:

Q. Your name is Juan M. Puente?

A. Yes, Sir.

Q. And you are the, a City Detective?

A. That is correct.

Q. You live in Laredo, Webb County, Texas?

A. That's right.

Q. It is my duty to warn you that certain evidence has been adduced at this Court of Inquiry that tends to incriminate you, and that you have a Constitutional privilege not

to testify on the ground that anything that you might say may incriminate you. Do you want to testify before this Court of Inquiry?

A. I decline to answer under the Provision of the Bill of Rights until I confer with my lawyer.

Q. Just a second; he wants to confer with his attorney.

THE COURT: You may confer with your attorneys.

(Witness conferring with attorneys.)

THE COURT: All right, Counsel.

MR. HORNBERGER: Your Honor, I have advised this witness to refuse to testify in this proceeding on the ground that this entire proceeding is without legal effect and the Statute under which it was brought is unconstitutional.

BY MR. KAZEN:

Q. You are not refusing to testify on the ground that any evidence may tend to incriminate you, Mr. Puente?

A. No, Sir, I refuse to testify.

Q. You just refuse to testify at this time?

A. I refuse to testify. Any statement I make I confer with my lawyers.

Q. And you are refusing to testify only for the grounds stated by your attorney?

A. That's right, yes, Sir.

MR. KAZEN: I move that this witness be held in Contempt.

THE COURT: I will rule on that later. Stand down.

MR. KAZEN: You are excused.

WITNESS EXCUSED.